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10 **UNITED STATES DISTRICT COURT**
11 **SOUTHERN DISTRICT OF CALIFORNIA**
12 **(HONORABLE WILLAM Q. HAYES)**

13 UNITED STATES OF AMERICA,
14

15 Plaintiff,

16 vs.
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18 PEDRO CRUZ-TERCERO,

19 Defendant
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CASE No.: 07CR03021-QWH-1

DATE: 03/17/08

TIME: 02:00 PM

JUDGE: WILLIAM Q HAYES

COURTROOM: 4

**PEDRO CRUZ-TERCERO'S MOTIONS
IN LIMINE TO:**

- (a) Disallow 609 Evidence Regarding
Other Crimes;
- (b) Allow Reference to Punishment
Enhancement;
- (c) Allow U.S. Border Patrol Agents to
Testify at Trial

NOTICE OF MOTIONS

TO: THE UNITED STATES ATTORNEY

PLEASE TAKE NOTICE that on the above-referenced date, Defendant, PEDRO CRUZ-TERCERO, by and through his counsel, CHRISTIAN DE OLIVAS, attorney of record will move this Court to grant the above-entitled motion, pursuant to Federal Rules of Criminal Procedure Evidence 7(f), 12, 14, and 16, and the Fourth, Fifth and Sixth Amendments to the United States Constitution, hereby moves this Court to grant the above-stated motions. These motions are based upon the files and records of the case.

DATED: March 03, 2008

SIGNED: s/ *Christian De Olivas*

CHRISTIAN DE OLIVAS

ATTORNEY FOR DEFENDANT
PEDRO CRUZ-TERCERO

BACKGROUND

PEDRO CRUZ-TERCERO is charged in an indictment with violating 8 U.S.C. §1326, Deported Alien Found in the United States. The indictment charges that PEDRO CRUZ-TERCERO was previously removed subsequent to October 15, 2001. The Statement of Facts set forth in PEDRO CRUZ-TERCERO's Motions to Suppress is incorporated herein by reference as if fully set out.

I.

MOTIONS IN LIMINE

A. MOTION IN LIMINE RE: OTHER CRIMES AND BAD ACTS

1. *The conduct sought to be proven in other acts exceeds the limits set for purposes for which evidence of other crimes, wrongs, or acts may be admitted.*

The Government has not yet stated what its evidence will consist of. However if the Government seeks to introduce of other crimes with PEDRO CRUZ-TERCERO committed, the court must scrutinize severely such evidence sought to be introduced due to its ability to unduly prejudice the PEDRO CRUZ-TERCERO.

If the Government introduces evidence of any transactions other than those which are the subject of the indictment in order to show pattern of conduct the defendant must be permitted to show transactions with the public over that period of time in order to refute the pattern of conduct the Government is alleging. This would lengthen the trial substantially. Additionally the defendant is not charged with any crime involving any other crimes. The crime charged is specific to the crime that appears in the indictment.

The Court must be extremely careful to guard against the danger that a defendant will be convicted because of proof of other offenses rather than because

1 the government has introduced evidence sufficient to prove beyond a reasonable
2 doubt that the defendant is actually guilty of the offense for which he is being
3 tried.

4 Such evidence must be narrowly circumscribed and limited. The criminal
5 conduct must in some cases be similar to the offense charged; and the conduct
6 must be introduced to prove an element of the charged offense that is a material
7 issue in the case and the defendant has to be connected to it. Otherwise mini-
8 trials as to each other criminal transaction will occur. Even if a proffered item of
9 evidence can be pigeon-holed in a category, it must nonetheless be relevant to
10 establish an element of the offense that is a material issue. While proof of other
11 conduct may or may not be relevant with regard to relevant conduct, which
12 would be argued in a subsequent proceeding, the evidence must clearly show that
13 the defendant was aware of the other offenses and actively sought to bring about
14 its ultimate purpose.

15
16 2. *Even if other acts are relevant, they should be excluded as the prejudice*
17 *resulting from them outweighs their probative value.*

18 Rule 403 of the Federal Rules of Evidence provides that relevant evidence
19 “may be excluded if its probative value is substantially outweighed by the danger
20 of unfair prejudice (or) confusion of the issues.” This balancing is mandated under
21 the 9th Circuit’s 404(b) analysis:

22 Once the prerequisites have been satisfied, the evidence is admissible for
23 those purposes permitted by 404(b) if the court determines that the probative
24 value of the evidence is not substantially outweighed by the danger of unfair
25 prejudice. Bailleaux, 685 F. 2d at 1110.

26 In undertaking the balancing analysis, “the trial court” should also consider
27 the need for evidence of prior criminal conduct to prove a particular point. *id* at
28

1 1112 (citations omitted). Thus, the evidence should not be admitted unless there is
2 an identifiable need for it.

3
4 Taking into account the potential for unfair prejudice and the lack of any
5 need for this evidence the court should exclude any Rule 404(b) evidence. Even if
6 any of the previously discussed acts are somehow marginally relevant to the
7 instant charge, the evidence should nonetheless be excluded as admission of these
8 incidents would **tend to unfairly prejudice the jury against** PEDRO CRUZ-
9 TERCERO.

10 In United States v. Shackleford, 738 F.2d 776 (7th Cir. 1984) citing 2 J.
11 Weinstein and M. Burger, supra, paragraph 404(16) at 404-93 footnotes omitted,
12 said a defendant cannot be identified as the perpetrator of the charged acts simply
13 because he has at other times committed the same commonplace variety of
14 criminal acts except by reference to the forbidden inference of propensity. The
15 question for the court is whether the characteristics relied upon are sufficiently
16 idiosyncratic to permit the inference of pattern for the purpose of proof.”

17 The Government must come forward and meet its burden of proof and
18 show the reliability of this “evidence” before the court can make an appropriate
19 evaluation. Once it does, PEDRO CRUZ-TERCERO is satisfied that it will fail in its
20 effort. PEDRO CRUZ-TERCERO wishes to be tried on the facts of this case and
21 not on other uncharged “events” that lack credibility, proof, reliability, and
22 inherent relevance. The stakes are far too high to permit anything less. Without
23 such “evidence” the Government may have a far more difficult time in proving its
24 case, and that is why it are seeking to bolster its allegations.

25 The Ninth Circuit Court of Appeals has recently re-affirmed that other acts
26 evidence is disfavored because “the defendant must be tried for what he did, not
27 for who he (or she) is. Thus guilt or innocence of the accused must be established
28 by evidence relevant to the particular offense being tried, not by showing that the

1 defendant has engaged in other acts of wrongdoing.” United States v. Mayans, 17
2 F. 3d 1174 (9th Cir. 1994).

3 3. *Based upon the foregoing, PEDRO CRUZ-TERCERO respectfully*
4 *requests this honorable court to enter an order precluding the Government from*
5 *offering evidence of any other criminal convictions an/or transactions other than*
6 *those charged in the indictment.*

7
8 **B. MOTION IN LIMINE RE: SENTENCING ENHANCEMENT**

9 1. *It is unconstitutional for this court to apply 18 U.S.C. §924(e) to*
10 *PEDRO CRUZ-TERCERO as the same is a factual assessment, which increases*
11 *PEDRO CRUZ-TERCERO’s sentence and therefore may only be decided by a jury*
12 *upon evidence established by proof beyond a reasonable doubt.*

13 PEDRO CRUZ-TERCERO contends the facts surrounding his prior
14 conviction do not establish that he has the requisite number of the predicate
15 conviction to trigger section 924(e)(1). Further, PEDRO CRUZ-TERCERO
16 contends that this factual determination, because it doubles the penalty of the
17 instant offense, must be submitted to a jury and proved beyond a reasonable
18 doubt.

19 PEDRO CRUZ-TERCERO acknowledges that this issue appears to have
20 been resolved against him by the United States Supreme Court in Almendarez-
21 Torres v. United States, 118 S.Ct. 1219 (1998). Nevertheless, PEDRO CRUZ-
22 TERCERO raises the issue because Almendarez-Torres was decided by a five-to-
23 four majority and recent opinions by a member of that majority and by a majority
24 of the Supreme Court indicate that Almendarez-Torres was incorrectly decided.
25 See, Apprendi v. New Jersey, 120 S.Ct. 2348 (2000).

26 The factual determination of whether a prior felony conviction qualifies as
27 either a “serious drug offense” or a “violent felony,” as those terms are defined in
28 18 U.S.C. §§924(e)(2)(A) and (e)(2)(B), respectively, is an element of the offense of

possession of ammunition by a convicted felon in violation of 18 U.S.C. §922(g). The indictment, therefore, must allege as an element of the offense the one prior, predicate felony conviction.

2. *An indictment must contain the elements of the offense charged and fairly inform a defendant of the charge against which he must defend. Hamling v. United States, 418 U.S. 87, 117 (1974).*

Rule 7 of the Federal Rules of Criminal Procedure echoes this condition in its requirement that the indictment be a “plain, concise and definite written statement with the essential facts constituting the offense charged.” Fed. R. Crim. P. 7(c)(1). The Supreme Court has recognized the indictment’s role in warning a defendant of facts that may enhance his punishment upon conviction. See, e.g., Jones v. United States, 526 U.S. 227 (1999).

On June 26, 2000, the Supreme Court issued its decision in Apprendi, which addressed the constitutionality of an enhanced prison sentence under New Jersey’s “hate crime” sentencing enhancement statute when a jury had not found the operative “sentencing fact” beyond a reasonable doubt and, instead, the trial court simply had found the operative fact by a preponderance of the evidence at the sentencing hearing. The Supreme Court held that Apprendi’s enhanced sentence was unconstitutional. In the course of the Court’s reasoning in Apprendi, *the Court stated that “it is arguable that Almendarez-Torres was incorrectly decided.” Apprendi.* In light of the majority’s and Justice Thomas’s opinions in Apprendi, PEDRO CRUZ-TERCERO position is legally correct.

3. *Accordingly, this court should heed the Supreme Court’s suggestion and limit Almendarez-Torres to its facts and demand that the Government prove the enhancement element beyond a reasonable doubt.*

C. MOTION IN LIMINE RE: US BORDER PATROL AGENTS

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

1. I, CHRISTIAN DE OLIVAS, am a citizen of the United States and am at least eighteen years of age. My business address is 200 N. Bradford Ave., Ste L, Placentia, California 92870.
2. I am not a party to the above-entitled action. I have caused service of the following documents: **Notice of Motions; Motions in Limine** on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them:
 - a. Assistant United States' Attorney
3. I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 16, 2008

DATED: March 3, 2008

SIGNED: s/ *Christian De Olivas*

CHRISTIAN DE OLIVAS

ATTORNEY FOR DEFENDANT
PEDRO CRUZ-TERCERO